

**Before the Federal Communications Commission
Washington, D.C.**

In the Matter Of)	
)	
)	
Schools and Libraries)	CC Docket No. 02-6
Universal Service Support Mechanism)	
)	
Request for Review and/or Waiver)	
By Sweetwater City Schools <i>et al.</i>)	Application Nos. 917099, 919406,
of the Funding Decisions by the)	945733, 947375, 1012581, <i>et al.</i>
Universal Service Administrative Company)	

Affidavit of Thomas Bayersdorfer

I, Thomas Bayersdorfer, swear:

1. I provided some guidance, and acted as proctor, for the evaluators of the Responses to the Sweetwater Consortium Requests for Proposals.
2. Below I set forth my qualifications to proctor this process. I am unaware of anyone in the State of Tennessee who has more experience with E-Rate procurements. My experience includes the following:
 - a. I was the Director of Information Technology, State of Tennessee.
 - b. I was a founding member of the State E-rate Coordinators Alliance ("SECA"), an E-rate applicant group that works directly with schools and libraries to guide them through the mechanics of the E-rate approval process.
 - c. I am the District E-Rate Coordinator for the Metropolitan Nashville Public Schools, a school system that serves almost 83,000 children and ranks as the 42nd largest school district in the country.

- d. As District E-Rate Coordinator for a large school district, I understand and believe that:
 - i. Internet service is mission critical to the teaching and learning experience, standardized testing and school administration; and
 - ii. The installation of the fiber cable necessary to provide connectivity requires the design, engineering, installation and pricing of the cost of a physical fiber connection between the school building and existing cable.
 - e. I participated in procurements for E-rate services in 2002, 2007, 2011, and 2016.
3. Accordingly, I believe that I am fully versed in the “cost-effectiveness” determination required when reviewing the responses of prospective providers of E-rate services.
- a. I understand and appreciate that price is always the primary factor for consideration, and therefore am duly sensitive to that consideration when preparing requests for proposal and evaluating responses.
 - b. I have read and studied the *Universal Service Order* in which the Commission stated that “price should be the primary factor in selecting a bid.”
 - c. I am also aware that factors other than cost can and must be considered when analyzing cost-effectiveness. These factors include “prior experience, including past performance; personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives.” As the Commission stated in *Tennessee* and reaffirmed in *Ysleta*, “a school should have the flexibility to select different levels of service, to the extent such flexibility is consistent with the school’s

technology plan and ability to pay for such services, but when selecting among comparable services, however, this does not mean that the lowest bid must be selected.”

4. I was asked by Larry Stein, then the Supervisor of Instruction for the Sweetwater City Schools, to help manage the request for proposal process of a consortium of approximately 75 school districts to be known as the “Sweetwater Consortium.”
 - a. Larry indicated that he desired to make use of my experience in both procurements and E-rate to assist in this process.
 - b. At the time, all of the members of the Consortium had the option of obtaining services through AT&T’s “NetTN” contract with the State of Tennessee.
 - i. I was very familiar with the NetTN contract as it had been an option that had been considered by MNPS.
 - ii. I was also aware that the NetTN contract assured the State of Tennessee of the best market pricing available provided by AT&T.
5. I assisted in the development of a Request for Proposal, which had to take into account the following factors:
 - a. The Consortium included approximately seventy-six schools districts with 832 sites, many of which were located in the more rural portions of the state.
 - b. The Consortium would require the use of more than 600 circuits.
 - i. There are three elements of cost with any circuit.
 1. First, there is the cost of construction.
 2. Second, the on-going monthly cost for mileage when applicable.

3. Third, there is the cost of internet service. In the case of schools that require more than just a connection, we refer to “managed services.”
 - ii. The first step in providing service would be to design, engineer and construct a physical connection with the school and the internet.
 - iii. Some districts are so rural that not only were there no existing connection, but no identifiable fiber connection in proximity.
 - iv. As the members of the Consortium were spread across the broad width of the State, the awarded vendor would have to deal with a number of different telephone company providers and “local loop” providers. It was obvious that the winning bidder would NOT own all of the circuits, but would be required to contract with numerous providers to complete the required network.
 1. By my count, the winning bidder would need to deal with at least twenty different telephone companies.
 2. By my count, AT&T had existing circuits to service a small percentage of the total number of circuits required.
 3. My understanding is that ENA had arranged service for most of the circuits by contracting services from multiple telcos, including AT&T.
- c. The Consortium members each required a guarantee of sufficient bandwidth to each site to be serviced, realizing that the site specific needs required a solution tailored to that site.

- d. The Consortium required a guarantee of continuity of service since teachers had to have access when they needed it during their class period. As it is inevitable that there will be service interruptions, continuity of service requires a service provider who can monitor performance, anticipate outages and, when there is an outage, immediately respond.
 - c. The Consortium had to have adequate content filtering to assure:
 - i. That the content needed by the schools was accessible; while,
 - ii. Preventing the students from accessing inappropriate material.
6. In developing the RFP, I considered the following factors.
- a. As I had developed a number of E-rate RFP's and administered the contracts with the winning bidders, I had learned a lot about what to ask in an RFP.
 - b. I knew that the RFP had to accommodate a number of business models to assure that the districts obtained cost-effective services.
 - i. Some carriers, such as AT&T, express a preference to build and own their own network of fiber.
 - ii. Other providers, such as ENA, prefer to contract services from numerous providers to build and coordinate a network that relies upon the best provider of each circuit.
 - c. I knew that the winning bidder should be able to design, engineer and install circuits in large metropolitan areas, such as Memphis that was already well served by internet providers, and remote rural areas that would require the design, engineering and installation of new circuits.

- d. I knew that it was important that vendors establish a single point of contact who would assume responsibility for assuring that the schools' internet connections were up and working.
 - i. A circuit is a collection of hardware and cabling that could be owned by multiple providers. For example, AT&T may have run cable to a county that is serviced by a local telephone company that runs cable throughout the county, including to the school, where yet more hardware and cabling has been installed.
 - ii. When something goes wrong, it is important that someone assume responsibility for fixing it, regardless of who owns the cable and hardware.
- 7. The RFP was reviewed by the Comptroller's Office of the State of Tennessee and found to be within State law and State of Tennessee procurement rules.
- 8. I am unaware that USAC has expressed any concerns about the RFP that issued in this procurement.
- 9. I prepared the score sheet that was used in this procurement. I have developed many score sheets for multiple procurements over the years, and believe that this one is as detailed and comprehensive as any that I have seen.
 - a. In accordance with existing guidance, pricing is weighted more than any other factor.
 - b. In accordance with the needs of the districts, the score sheet also evaluated each bidder's business plan to implement service, the experience and qualifications of those assigned to the project, and the organization chart of the team, each bidder's plan for network connectivity and its service standards in each category

of required service. Having assessed each bidder's plans, the score sheet also assessed each bidder's prior relevant experience.

10. Although I did not choose the evaluation team, I was pleased with the mix of talents and abilities of the evaluators. The team consisted of Steven Johnson of the Hardin County schools, who had impressive technical expertise, Joan Gray of the Bedford County Schools, who had expertise in developing technology programs, and Melanie Miller, Director of Schools for the Sweetwater City Schools, who had supervisory responsibility for all functions of the school district releasing the RFP. Joan Gray was also the executive director of the Tennessee Educational Technology Association at the time. This seemed the perfect combination of complementary skill sets to assure the choice of the most cost-effective provider. The team was representative of the members of the consortium while providing the range of expertise and experience necessary to a complete evaluation.

11. The review process took more than nine hours as it involved a section-by-section review of the responses to the RFP.

- a. I proposed the process to the evaluators, and they concurred. They were directed to each independently read and grade each category of responses to the RFP. Only then would they convene as a group to compare and discuss their responses. After doing so, they would agree upon a consensus score, and then move on to the next category of the score sheet.
- b. I served principally to proctor the process. At no point did I offer any judgment about the responses. On occasion, I would note to the evaluators that the bidders, principally AT&T as I will explain below, had included information

that might be responsive to a particular category someplace in its response other than the location required in the instruction of the RFP to the bidders.

12. I will offer these comments about what I observed about the evaluative process.

- a. The evaluators took their job very seriously, studying each category of response and discussing them until they had reached a consensus opinion.
- b. In my observation, their initial scoring of the responses was often consistent even before they began their discussion.
- c. ENA had organized its response in accordance with the RFP, which facilitated the grading process.
- d. AT&T failed to include all of the information requested by the RFP in the location of its Response being graded.
 - i. On several occasions, the evaluators, sometimes with my prodding, found information elsewhere in AT&T's response to the RFP that was considered, and credited in the scoring, of its otherwise incomplete response to that specific category.
 - ii. Indeed, the need to examine AT&T's entire response to identify the information responsive to a specific category ultimately resulted in the evaluators combing through the entire document after all of the grading had been completed in order to assure that AT&T had received full credit for all of the information contained in its response.
 - iii. While the evaluators could have assumed that "what's not there does not exist," they gave AT&T every benefit of the doubt in reviewing the response.

- e. Notably, this likely worked to the detriment of ENA, whose organized response included all of the information necessary to grade a category of the response.
13. The evaluation team considered pricing last and was confronted with a real challenge to understand AT&T's pricing.
- a. ENA had provided pricing for the managed services across installed cable to all schools.
 - i. ENA was the current service provider.
 - ii. ENA had already designed, engineered and installed all of the required circuits.
 - b. AT&T appeared to provide two different pricing schemes, but then to provide that only one would control.
 - i. In Tab III of its Response, AT&T provided the cost of "managed services" but provided that installation would be charged separately.
 - 1. "AT&T will bill for services as they are rendered for installation and equipment charges." AT&T Response, Tab III, page 1.
 - 2. AT&T's response for second component of charges "Billing will occur for managed services on a monthly basis."
 - 3. "We will submit Service inquiries for all school locations and our engineering and outside plant staff are prepare to begin as soon as orders are in the system." AT&T Response, Tab IV, page 2.
 - 4. "The typical installation period for Metro Ethernet type circuits is 90 days, providing there is no Special Construction required"

AT&T Response, Tab IV, page 2; “AT&T will endeavor to meet all delivery dates.” AT&T Response, Tab IV, page 3.

- ii. Accordingly, AT&T’s price did not include installation costs for all 617 circuits; ENA’s did.
 - iii. In its response at Tab III, AT&T failed to provide the information required for an “apples to apples” comparison of its bid with ENA’s bid.
- c. AT&T further confused the issue of pricing by referring to the NetTN contract and stating that it could not charge less than what it charged under that contract.
- i. “...the pricing offered under the NetTN Service Contract is the lowest corresponding price that AT&T is required to offer to Sweetwater under the lowest corresponding pricing requirements of E-Rate rules.” AT&T Response, page 13.
 - ii. AT&T had not provided the pricing from the NetTN contract; however, the panel knew that it was publicly available.
 - iii. The panel discussed this limitation. After some discussion, the panel concluded that it could not consider the NetTN contract and its pricing as offered by AT&T because the contract did not give all of the information needed to evaluate the bid.
- d. After some discussion, we concluded that our only choice was to run a mathematical calculation that compared AT&T’s Tab III pricing to ENA’s pricing even though we knew it was not an apples-to-apples comparison.

- i. In past procurements, I had compared pricing by building a spreadsheet that made assumptions about needs and plugging in each vendor's pricing for that need.
 - ii. Obviously, that comparison, in order to be valid, required that the vendor's pricing be complete.
 - iii. AT&T had not provided complete pricing; yet, the panel felt compelled to either perform the comparison or throw out AT&T's bid. It elected to run the numbers, and asked me to do so.
- e. The panel faced another issue in comparing pricing because there was no way to develop a cost of filtering using the AT&T response to the RFP.
- i. At the panel's direction, I called AT&T's David Ford in the middle of the evaluation process to work with him to obtain a number for its filtering cost.
- f. Even with these extraordinary steps to divine what AT&T was bidding, the panel had no assurance that the numbers used were accurate.
- i. AT&T had qualified its response in Tab III to reference an administrative charge that was not included in the numbers that I plugged into the spreadsheet.
 - ii. Indeed, the panel was not even sure that ATT's pricing was its final pricing: "The information and pricing submitted with the RFP Response will be subject to change on account of any error or omission in the RFP information provided by the Customer or upon further investigation as to local conditions and the exact requirements of any future order." AT&T Response, p. 18.

- g. The final allocation of the scoring for price was the product apportioning points relative to the pricing that was generated by me using an Excel spreadsheet to plug in the vendor's proposed pricing.
- h. I am aware that USAC has taken the position that AT&T and ENA offered pricing for the same or similar services, and I reject that statement as objectively false. The panel knew that AT&T's pricing, as used in my spreadsheet, did not include installation. The panel knew that the NetTN pricing, which AT&T represented was the lowest available price, was much higher than AT&T's pricing that was included in the bid.
- i. I affirmatively reject the suggestion that the bids offered similar services.
 - 1. I have been provided a copy of USAC's letter of May 21 in which USAC states, "A thorough review of the bids provided by ENA and AT&T shows that the bids are similar in services offered."
 - 2. As will be explained below, the evaluation panel utilized a thorough and objective review process to arrive at a different conclusion.
 - 3. Having observed the review process and read the responses, I am at a total loss how anyone could read those submissions and concluded that they could substitute their judgment for that of the panel.
 - 4. Insofar as Mr. Nieto impugns the integrity of the panel in its grading, I proctored the entire process and saw no evidence of any bias against AT&T by any member of the panel.
- j. The panel considered declaring the AT&T bid non-responsive since it failed to include installation charges, or even promise of timely installation. It concluded

that the scorecard accommodated those defects in the AT&T response elsewhere in the scoring.

14. Pursuant to the award to ENA on March 1, 2013, ENA offered the Consortium the choice of two form contracts to memorialize the standard terms and conditions of the contract. ENA signed and returned the Sweetwater Consortium's form contract. It also proposed the use of the MNPS form contract.

- a. It should be noted that both documents were generic forms that simply added the routine terms and conditions of any procurement, and did not contain the operative provisions of the contract.
 - i. These forms contain standard provisions that are utilized in procurements of every type such as the:
 - 1. The vendor's duty to indemnify the district for any challenge by third parties to the ownership of the intellectual property being provided by the vendor;
 - 2. The vendor's duty to comply with federal laws;
 - 3. The vendor's duty to maintain records;
 - 4. The vendor's duty to maintain insurance; and
 - 5. Standard "boilerplate provisions" that govern, for example, the choice of Tennessee law for the interpretation of the contract.
- b. The operative provisions were governed by the award, as is acknowledged by the provision that the contract consists of the RFP and Contractor's Bid Proposal.

- c. The Consortium chose to use the MNPS form contract simply because it saved them the hassle of filing the paperwork required by state law to adopt the new Sweetwater Consortium form contract.

15. Conclusion: I believe that the process worked. The process assured the choice of the most cost-effective provider for these services. Beyond the thoroughness of the process, my somewhat removed view of the merits of the bid responses is that the panel reached the right result.

- a. I have participated in numerous RFP processes. In my experience, this is one of the most thorough review processes that I have ever seen. The scoresheet was the most involved that I have ever used, and the panel the most conscientious that I have witnessed.
- b. Given my experience, I concur in the conclusion reached by the panel. While I was only the proctor, I did read both responses and listened while the panel did their assessment. I do not know how they could have reached any other conclusion.

16. While the Sweetwater Procurement stands on its own merits, it is important to appreciate the historical events that set the stage for this procurement as the Sweetwater Consortium is the result of unfounded concerns about previous procurements.

- a. Many of the consortium members had previously participated in the Greenville City School contract. As there had been no issues with, or challenges to, that procurement, it provided an example of a procurement for E-rate services.

- b. In 2011, one year prior to the expiration of the Greenville procurement contract, a consortium of 78 school districts in Tennessee conducted a competitive procurement for E-rate eligible services and awarded a contract to ENA.
- c. Although the existing statewide procurement contract lasted through June 30, 2012, Metro Nashville Public Schools (MNPS), the lead district on the consortium, decided to execute a procurement one year in advance of the 2012 expiration date of the Greenville contract to allow a winning vendor, if not ENA as the existing vendor, to have one year to design, engineer and install a replacement network.
- d. Slightly more than half of the 120 participating school districts signed a letter of agency to participate in the MNPS procurement, as there was still a year remaining before the expiration of the 2007 contract.
- e. The remaining school districts planned on conducting a procurement for the following year. This changed, however, when, relying on verbal guidance received at the annual E-rate training conducted by USAC staff, and later confirmed by specific written guidance from USAC, the 43 additional Tennessee school districts took services under the MNPS contract, as allowed by state law.
- f. These districts ordered and received services from the MNPS contract with ENA, and applied for E-rate funds utilizing that contract for funding year 2012.
- g. Despite its own prior written guidance, USAC subsequently denied funding for all 43 districts. A request for waiver of the Commission's rules to allow the school districts to take services under the five-year MNPS contract was filed

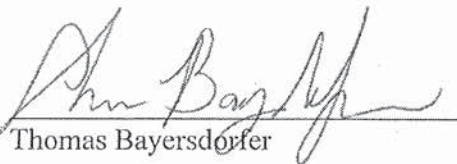
with the Commission on February 11, 2013. The Commission has yet to issue a decision on that waiver request, leaving those districts in limbo.

- h. Due to the denials in 2012, the 43 districts formed the Sweetwater Consortium and through a lead district, Sweetwater City Schools, conducted a new competitive bidding process. The consortium was formed as a protection against further delay of E-rate funding, despite the belief that no FCC rules were broken in the previous procurement.
- i. Having monitored the development of a statewide network in my various capacities over the years, I can attest that AT&T can serve only a very small percentage of the rural districts in Tennessee because AT&T does not have existing cable infrastructure to serve the vast majority of the districts.
 - i. For example, AT&T has existing infrastructure in Davidson County that it can use to service the MNPS district.
 - ii. But, AT&T does not fiber infrastructure in many of the smaller districts that requested and required service under these various RFP's. In those districts, AT&T is faced with the choice of:
 - 1. Designing, engineering and installing new infrastructure; or
 - 2. Declining to provide circuits in those districts.

17. In asserting that AT&T and ENA offered similar services, USAC seems to have ignored AT&T's refusal to commit to the installation and the pricing of installation; accordingly, the MNPS experience with AT&T's most recent response to a 2016 RFP is illuminating in that AT&T refused to even bid on circuits in areas in which AT&T had not already installed circuits.

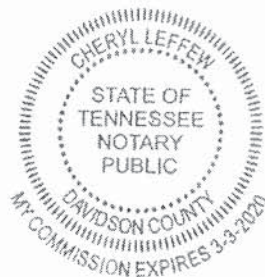
- a. The most recent MNPS procurement asked for bids for services in many districts outside AT&T's existing service area. "MNPS RFP 16-11 Internet Access & Telecommunications Services,"
http://www.mnps.org/pages/mnps/About_Us/Departments/Purchasing/Bid_on_current_procurements/RFP_16-11_Internet_Access_and_
- b. In its bid response, AT&T failed to provide pricing outside of the MNPS district.
- c. During the review of that response, we actually called David Ford of AT&T to confirm that AT&T did not intend to provide pricing for any of the consortium districts other than MNPS.
- d. The business record confirming that conversation is attached hereto. Mr. Ford explained that AT&T could not provide the MNPS rates offered in the bid response to the smaller districts.

I certify under penalty of perjury that the foregoing is true and correct.


Thomas Bayersdorfer

Subscribed and sworn to before me this 4 day of May, 2016.

[Seal]




Notary Public

MNPS RFP 16-11

Date: 2-15-16

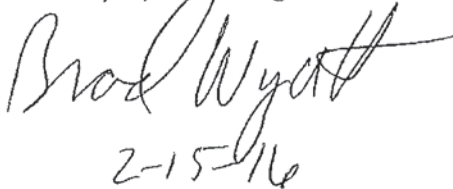
Subject: Conversation with AT&T Proposal contact and MNPS sales rep David Ford

At approximately 1:00 PM CT on 2-12-16 I called David Ford to obtain clarity and confirmation regarding AT&T's choice to only provide pricing to MNPS rather than all the consortium members identified in the RFP. David confirmed to me that the pricing was indeed only available to MNPS. I ask David why pricing was not provided to the other consortiums members and David explained to me that AT&T could not provide the offered MNPS rates to the smaller districts (he gave an example of a district with only 4 schools). I explained to David that though MNPS had yet to make a decision we would most likely find his proposal un-responsive. To this David claimed that the RFP did not indicate proposers could not offer pricing to only one district. To refute this claim I directed David to the opening paragraph of the RFP which clearly states the RFP is for the entire consortium and not just MNPS. As I began reading this paragraph to David he advised me that he knew what it said, however, to make my point I finished reading the paragraph to him anyway.

I also asked David if AT&T was hoping to gain the other consortium members business through the State RFP for the same services. David advised me that "YES" that was their hope and that the State was currently reviewing proposals. He mentioned the State was about to begin the second phase of the proposal review process which was the pricing sections.

As we finished our conversation David appeared content with the AT&T response (he did not ask or offer to change their response) and my responses.

Brad Wyatt/Contracting Office MNPS



2-15-16